LIBRARY
SUPREME COURT U. S.

Office - Supreme Court, U.S.
FILED
MAR 13 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

CLAUDE PEPPER
WALTER A. APFELBAUM
37 N. E. First Avenue
Miami, Florida

PAT WHITAKER, TOM WHITAKER,
MARK R. HAWES
308 Tampa Street
Tampa, Florida
Counsel for Petitioner

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	15
APPENDIX A—Opinion and Judgment Below	App. 1
APPENDIX B—Opinion and Judgment of the Supreme Court of Florida	App. 9
APPENDIX C—The Information in Question in this Case	App. 15

CITATIONS

CASES:	Page
Ballard v. U. S., 329 U. S. 187, 195 (1946)	9
Berger v. U. S., 295 U. S. 78 (1935)	11
Brown v. Allen, 344 U. S. 443, 448, 506 (1953)	13
Burns v. Wilson, 346 U. S. 137 (1953)	12
Carter v. Texas, 177 U. S. 442 (1900)	9
Chambers v. Florida, 309 U. S. 227 (1940)	15
Cranor v. Gonzales, 226 F. 2d 83 (9th Cir. 1955)	9
Frank v. Mangum, 237 U. S. 309, 340, 349 (1915)	5
Haakinson v. U. S., 238 F. 2d 775 (8th Cir. 1956)	11
Houchins v. State, 154 Fla. 283, 17 So. 2d 82 (1944)	8
Kidwell v. U. S., 38 App. D. C. 566	11
Kotteakos v. U. S., 328 U. S. 750 (1956)	10, 11
Kuykendall v. Hunter, 187 F. 2d 545 (10th Cir. 1951)	11, 12
Leyra v. Denno, 347 U. S. 556 (1954)	13
Malinski v. New York, 324 U. S. 401 (1945)	9
McElroy v. U. S., 164 U. S. 76 (1904)	8, 10, 11
Powell v. Alabama, 287 U. S. 45 (1932)	10

CITATIONS (Cont.)

CASES: Page

Rochin v. California, 342 U. S. 163 (1952) 10

Sepulveda v. Squier, 192 F. 2d 796 (9th Cir. 1951) 9

Snyder v. Massachusetts, 291 U. S. 97 (1934) 7, 8

Stroble v. California, 343 U. S. 181 (1952) 14

U. S. v. Handy, 351 U. S. 454 (1956) 12, 13, 14

MISCELLANEOUS:

Note, *Controlling Press and Radio Influence On Trials*, 63 Harv. L. Rev. 840 (1950) 12, 14

Packard, *The Hidden Persuaders*, (1957) 14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. ____

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To The United States Court of Appeals For The Fifth Circuit

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on December 30, 1957.

CITATIONS TO OPINIONS BELOW

The U. S. District Court in and for the Southern District of Florida, Jacksonville Division, rendered no opinion in this cause. Its Final Judgment appears in the printed

transcript of record, nine copies of which are submitted herewith, at pages 23-24. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix A hereto, infra, p. 1-8, is reported at 250 F. 2d 645. The state trial court rendered no opinion. The opinion of the Supreme Court of Florida in the initial appeal to that Court of the matters involved in this habeas corpus case is reported at 83 So. 2d 694 (1955) (Appendix B). Certiorari to the Supreme Court of the State of Florida was denied by this Court in 350 U.S. 987 (1956).

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on December 30, 1957, (R. 40; p. 8, Appendix A, infra). The timely petition for re-hearing was filed January 18, 1958, (R. 48). Re-hearing was denied January 29, 1958 (R. 52). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether a conviction based on an information charging several defendants with per se unrelated, although similar crimes, without allegation of conspiracy or concert of action, nor involvement of each with the crimes of the other, and subsequent joint trial of said misjoined defendants, is subject to collateral attack as being violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States without regard to an affirmative showing of prejudice beyond what may be logically inferred from the nature of the proceedings.

2. Whether it is a violation of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States for a state authority to proceed to trial over objection urged in an area which for two years had been infected with a hostile press campaign against the defendant, with approximately ninety seven emotionally toned articles, almost all stating or inferring defendant was a criminal, having been published.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein is that part of the Fourteenth Amendment to the Federal Constitution which provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory authority of the Federal Courts to grant habeas corpus is contained in Title 28 U.S.C. 2241 as follows:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> • • • •

(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • • •

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;"

STATEMENT

Harlan Blackburn, Petitioner, had been convicted of violating the lottery laws of Florida on December 19, 1953. (TR. 1687; the transcript of the proceedings in the original Florida state trial was filed in the instant proceedings and made a part thereof; this transcript has been separately certified to this Court. In this Petition, references to it are denominated "TR"; references to the record in the court below are denominated "R"). The Supreme Court of Florida affirmed the conviction and sentence of Petitioner (App. B., 83 So. 2d 694), and after rehearing was denied (TR. 1793-94), a petition for a writ of Certiorari was filed in this Court, and subsequently denied (350 U. S. 987). On March 23, 1956, Petitioner began execution of the judgment and sentence of the state court. Thereafter, he filed his petition for a writ of habeas corpus in the United States District Court, Southern District of Florida, Jacksonville Division (R. 1-10) invoking its jurisdiction under 28 U.S.C. §2241. On March 11, 1957, after argument and the filing of briefs, but without taking additional testimony, the District Court entered its Order Granting Writ of Habeas Corpus and Writ of Habeas Corpus, returnable on March 14, 1957 (R. 16-18). On that latter date, final judgment releasing Petitioner from

custody was entered. (R. 23-24). An appeal was taken by the custodian of the Florida state prison, Respondent herein, to the United States Court of Appeals for the Fifth Circuit which reversed the District Court (App. A).

Petitioner asserted violation of his rights to a fair trial, predicated on a fair charge, in his application for habeas corpus (R. 1-10; all constitutional questions were explicitly raised in the application and passed on below.) The information which commenced the continuous violation of his rights under the Fourteenth Amendment is set out in Appendix C. Petitioner contends that misjoinder of defendants and offenses as set out in this charging document and subsequent trial of all together, violated due process and equal protection of the laws. Petitioner had raised these points at the trial stage by his motion to quash the indictment (TR. 58) and for severance (TR. 159); the federal questions were pressed before the Supreme Court of Florida (TR. 1721-22; 1782-86), and throughout as to both the misjoinder and venue (adverse publicity) points.

The second manner of deprivation of a fair trial occurred in trying petitioner in an area in which the jurors were "extremely likely to be impregnated by the environing atmosphere."[1] (R. 2-3; 8-9).

Between October 10, 1951, and September 30, 1953, approximately ninety seven different newspaper articles had been published about Petitioner in papers with wide circulation in Polk County, Florida. Ten of these articles called appellee "Kingpin" or "Brains of Lottery Gang;" 12 named him as "Kingpin of Rackets;" 13 described him

[1] *Frank v. Mangum*, 237 U.S. 309, 345, 349 (1915).

as "Notorious Kingpin of Gambling Rackets;" 9 called him "Orlando Racketeer;" 13 called him "Bolita Kingpin;" called him "Head Man of Ring;" 3 called him "Boss of Three-County Ring;" 3 the "Head of Operations;" and others "Bolita Chieftain"; and 2 called him "Gambling Overlord."

Similar appellations were applied at least once and as shown by Exhibit "A" to appellee's Motion for Change of Venue (TR. 166) it was widely published in the press that appellee had caused the assassination of three men one almost on the very eve of the trial.

The verified venue motion alleged that the populace of Polk County had been saturated with a campaign depicting Harlan Blackburn, Petitioner, as a dangerous criminal preying upon the working people of Polk County through the operation of one of the most diabolical gangs infesting society (the Mafia), causing him to be regarded by the populace as something loathsome, rendering him "so odious to the inhabitants of said Polk County that it would be a matter of impossibility for him to receive a fair and impartial trial in said County." (TR. 169-177).

Petitioner's motion also averred that he and the charges against him had been made a political football in the race for sheriff of Polk County, and that a candidate generated and caused talk and gossip all over Polk County, although without basis in fact, that Petitioner was friendly with one of the candidates for said office and that Petitioner was a dangerous criminal. These charges became the subject of talks before some civic organizations. (TR. Vol. 1, pp. 167-168).

None of these facts was denied by the prosecution (TR. 178-181), which only rebutted another ground not here relied upon and asserted as a conclusion of law that the facts did not preclude a fair trial. This verified and non-traversed evidence was all that the district court or the Fifth Circuit had before it as to the press campaign.

On voir dire, it became apparent that a large number of jurors were acquainted with the case. Twenty-six prospective jurors were excused for having fixed opinions. (TR. Vol. II, pp. 210, 231-2, 233, 235, 238, 239, 281, 296, 304, 305, 306, 320, 322, 328, 348, 352, 354, 356, 399, 409, 410, 411, 413, 414 and 417). After Petitioner exhausted his peremptory challenges he again unsuccessfully moved for a change of venue. (TR. 439). Each of the six chosen jurors had previous knowledge, in the environing atmosphere of the case (TR. 387, 395, 360, 418, 415, 419, 417).

REASONS FOR GRANTING THE WRIT

At the outset, it would be well to delimit the nature of the first question presented and the thesis here urged. Petitioner does not challenge the *sufficiency* of the indictment, nor does he contend that it contains multiple misjoined offenses that he alone committed. Rather the fundamental constitutional violation goes to the issue of misjoined defendants (and, pari passu, the offenses these defendants committed), and what has become known in other contexts as "guilt by association" and other evils attendant on such misjoinder.

1. Procedural due process is not merely a matter of reaching a right result; in addition the manner of reaching that result must be fair. *Snyder v. Massachusetts*, 291

U. S. 97 (1934). In adopting as it did, a test of "fundamental fairness", which in terms of the facts of this case meant that Petitioner had to demonstrate active prejudice apart from the per se misjoinder of the charging document and the attendant consequences of a joint trial, the decision below conflicts in principle with the broad standard of the *Snyder* case.[2]

The first count of the information under which Petitioner was brought to trial (Appendix C infra) jointly charges Petitioner and others with operating a lottery in five counties.[3] In the same count others (Frank Duskin, Geraldine Berry) are separately and distinctly charged with operating a lottery in four and two counties respectively without allegation of conspiracy or connection in any way between Duskin, Berry or Petitioner. In the second count, charging a different method of violating the same statute, seventeen new defendants appeared and the same misjoinder occurred. The same defects permeate counts three, four and five.

This charging document should be held to be per se violative of due process. Cf. *McElroy v. United States*, 164 U. S. 76 (1896); *Houchins v. State*, 154 Fla. 283, 17 So. 2d 82 (1944). Conceding arguendo that the trial, as the opinion below noted, may have revealed one lottery operation with Petitioner at its head, nevertheless due process for purposes of collateral attack or otherwise does not demand "proof" of prejudice, and the Fifth Circuit in looking to the evidence adduced at the trial to negative

[2]That a conflict in principle along narrower lines with other holdings of this Court and other federal courts exists will be alluded to infra under point two.

[3]No complaint is here made or has been made as to those jointly charged with Petitioner.

the existence of prejudice was in error. Furthermore, the curious reasoning that because petitioner had previously been tried in a conspiracy trial, he knew from the evidence there introduced what the State claimed to be the connecting links between the various offenses and the several offenders is an erroneous departure from procedural due process. What the Fifth Circuit did in essence is adopt an after the fact or "right result" test in demanding proof of active prejudice, and reasoning as it did.

In this sense this case raises a broad philosophical question with respect to charging documents and the Fourteenth Amendment which this Court should resolve. Procedural due process is not a matter of rightness of results, but of results rightly reached. The entire concept of the extrinsic evidence formula as applied to challenged indictments or informations is violative of this thesis; nor is the Fifth Circuit alone in these pronouncements, e.g., *Sepulveda v. Squier*, 192 F. 2d 796 (9th Cir. 1951). In Negro exclusion grand jury cases, this Court never inquires as to whether the defendant was "prejudiced" or whether the result might have differed with another proper grand jury, e.g., *Carter v. Texas*, 177 U. S. 442 (1900); see *Ballard v. United States*, 329 U. S. 187 (1946).[4] Where a coerced confession is admitted, the inquiry as to whether the evidence, however substantial, supports the conviction is immaterial, e.g., *Malinski v. New York*, 324 U. S. 401 (1945); *Cranor v. Gonzales* 226 F. 2d 83 (9th Cir. 1955); *cert. den.* 350 U. S. 935 (1956). Even under the less rigorous but increasingly similar standards of the Fourteenth Amendment as applied to state criminal procedure as contrasted with federal trial standards, some

[4] "[R]eversible error does not depend on a showing of prejudice in an individual case." 329 U. S. 185, 195 (Exclusion of women).

denials of the right to counsel result in the conviction being vitiated, e.g. *Powell v. Alabama*, 287 U. S. 45 (1932), and some tainted evidence must be excluded, e.g., *Rochin v. California*, 342 U. S. 165 (1952). Why should an egregiously faulty indictment, as in this case, differ? Petitioner does not contend that all charging documents containing an element of misjoinder are violative of due process but certainly some of them, together with subsequent joint trial of all misjoined defendants, result in a violation of due process. The implication of the inquiry along these lines is important, and this case offers appropriate facts for this Court to offer its reasoning thereon.

Nor is prejudice lacking. Petitioner had to prepare not for one trial but for twenty two trials, a burden which is highly material. See *Kotteakos v. U. S.*, 328 U. S. 750, 767 (1956).[5] Challenges to the jury were affected and the jury was necessarily distracted by the multiple joinder and trial thereon, *McElroy v. United States*, supra. Finally, guilt was bound to spill over by association with others misjoined and tried together. If the state prosecutor could join, without allegation of connection in any way, the Petitioner and others misjoined below, and Petitioner must prove prejudice, state prosecutors can act with impunity from federal review and join any unrelated crimes and defendants regardless of how one crime and defendant might affect the other.

Apart from the material prejudice that is inherent in this case, two other considerations gravitate toward non-application of a formula requiring an affirmative showing

---

[5] "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application." 338 U. S. 750, 772.

of prejudice. How is prejudice proved? The difficulty of this task, see e.g. *Kuykendall v. Hunter*, 187 F. 2d 545 (10th Cir. 1951), is perhaps a consideration in cases such as the Negro exclusion instances discussed above. And the salutary prophylactic effect of a reasonably rigid standard in this area is apparent. Hypertechnicality is not here involved; prevention of gross but non-extrinsically demonstrable abuse is. This Court should decide this question which is doubly important in terms of its implications for the meaning of due process, and in terms of the thousands of prosecutions potentially affected.

2. The conflict with the due process ramifications of the *Snyder* case has already been alluded to above. Additionally, the decision below conflicts with the principles not of due process but certainly of due process implications, enunciated as to federal criminal procedure in *Kotteakos v. U. S.*, supra, *McElroy v. U. S.*, supra, and *Kidwell v. U. S.*, 38 App. D. C. 566 (Two unconnected charges of rape cannot be joined). The *Kotteakos* case involved proof of multi-conspiracies on an indictment for a single conspiracy, and *McElroy* was a multi-joinder of parties for theft and arson. The *Kotteakos* case, the most recent expression of this Court as to joinder in charging documents, is possibly widely misunderstood by the lower federal courts when compared with *Berger v. U. S.*, 295 U. S. 78 (1935), see, e.g., *Haakinson v. U. S.*, 238 F. 2d 775, 782 (8th Cir. 1956). The lines of demarcation between *Kotteakos* and *Berger* are not clear and amplification, which this case could afford, would be useful. The principles of the *Kotteakos* case, Petitioner urges, are at violence with the opinion below.

Moreover, *Kotteakos* raises another factor that also

has relation to the discussion under the first of the reasons above. Mr. Justice Rutledge there traced the history of the movement against hypertechnicality in criminal procedure and the consequent reform. 338 U. S. at 758 ff. It is now time to ask the question—should not the pendulum be shifted back slightly? *Kuykendall v. Hunter*, supra,[6] appears to be an illustration of the need for some retreat from the extreme entrinsic evidence formula that has arisen out of the standard that obtains in this area. This case similarly, in its requirement that prejudice affirmatively appear, raises the same considerations. Yet, while no inferences are indulged by the Fifth or Tenth Circuits in favor of the defendant, though warranted by the facts, the Ninth Circuit has seen fit to infer against the interests of the defendant, and on a logical basis certainly no more compelling than that rejected by the other two circuits, that the mere fact that a jury convicted on some counts, acquitted on others and disagreed on still others, demonstrates that there was *no* prejudicial misjoinder. *Haakinson v. U. S.*, supra at 782. This need for clarification and redress of an unfair balance emphasizes the importance of the federal question presented and colors the conflict in principle asserted.

3. Trial by newspaper and other media of mass communication is a problem increasingly occupying the attention of the courts and legal commentators. E.g. *U. S. v. Handy*, 351 U. S. 454 (1956); Note, *Controlling Press and Radio Influence on Trials*, 63 Harv. L. Rev. 840 (1950).

---

[6]The defendant in this case was charged with four unconnected rapes and wartime desertion. The court's insistence that prejudice must "affirmatively appear," as in the instant case, is a striking illustration of the danger of the extrinsic evidence test. Although a military conviction was reviewed, the court did not use the standards later formulated in *Burns v. Wilson*, 346 U. S. 137 (1953).

This case presents for this Court's consideration the important federal question of whether on the facts, a fair trial was denied Petitioner because of a failure to grant a change of venue, thereby depriving him of his rights under the Fourteenth Amendment to the Federal Constitution.

The facts are set out in the Statement above. The publicity adduced as evidence of the infected opinion of Polk County, Florida, where Petitioner was tried, was confined to the newspaper accounts (TR. 166 ff.). There was, of course, much more adverse publicity. Ninety seven emotionally toned adverse newspaper reports relating to Petitioner appeared, including comment that Petitioner had caused three men to be assassinated. The press was "out to get" Harlan Blackburn.

The effect of this deluge is a legal question; the "basic facts" are undisputed. E.g. *Leyra v. Denno*, 347 U. S. 556 (1954); *Brown v. Allen*, 344 U. S. 443, 488, 506 (1953). The trial judge was, as the opinion below noted, in a better position to judge this effect than any subsequent judicial authority. But a two year virulent press campaign, as a matter of law, must have precluded a fair trial, and blind adherence to the thesis than the judge on the scene can best tell the effect of such a campaign can only result in subversion of the fair trial principle.

Procedurally also, this case presents an appropriate congeries of circumstances for the exercise of this Court's discretion. Motion for change of venue was seasonably made before the voir dire examination (TR. 166 ff.). Compare the *Handy* case where trial counsel's failure to raise the point until well after the trial was deemed "significant"

351 U. S. 454, 463. This motion was renewed after the jury was chosen (TR. 439). Peremptory challenges were exhausted. Compare *Handy* where half these challenges remained, Ibid. Moreover, each of the jurors had "heard" of the case in some way (TR. 387, 395; 360; 418; 415; 419; 417). This state of affairs, with the emotionally toned labels of the newspaper accounts, created an atmosphere inimical to a fair trial. The emotional appeal of the publicity and the complete absence of counterpropaganda created a situation where the evidence—founded on logic, not emotion—was subordinate. See Note, *Controlling Press and Radio Influence on Trials*, 63 Harv. L. Rev. 840, 842 (1950).[7]

This Court has expressed itself only infrequently concerning trial by newspaper, e.g. *Handy*; *Stroble v. California*, 343 U. S. 181 (1952). The lines need amplification, and the denial of due process that obtains in this case affords an opportunity for further guidance on a federal question of continuing and increasing importance.

4. Three separate motions, to quash the indictment, for severance, and for a change of venue, were denied by the trial court. The substantive effect of these denials was to permit misjoinder of defendants, a joint trial, and trial in a county saturated with adverse publicity. Even if it be assumed, arguendo, that none of these circumstances in itself resulted in a deprivation of due process and equal protection of the laws under the federal constitution, the concatenation of these factors certainly had such an effect.

---

[7] Non-rational approaches to the influencing of important decisions are becoming insidiously more frequent and beguiling. Packard, *The Hidden Persuaders*, (1957).

This case, therefore, raises the important issue of how (arguendo) merely marginal errors, singly, may, in combination, result in a gross violation of federal constitutional rights, and affords this Court an opportunity for considered examination of this problem. Cf., e.g., *Chambers v. Florida*, 309 U. S. 227 (1940).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CLAUDE PEPPER
WALTER A. APFELBAUM

PAT WHITAKER
TOM WHITAKER
MARK R. HAWES
Counsel for Petitioner

PROOF OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 12th day of March, 1958, to Richard W. Erwin, Attorney-General of the State of Florida, Attorney for Respondent, at his offices in Tallahassee, Florida.

Claude Pepper

CLAUDE PEPPER

APPENDIX A

OPINION BELOW

In The United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16681

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Appellant,

versus

HARLAN BLACKBURN,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(December 30, 1957.)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a final judgment in a habeas corpus proceeding releasing and discharging from custody a State prisoner. Upon the record of the trial in the state court, and without taking any other testimony, the district court found

> "that in the denial of his motion to quash the information, in the denial of his motion for change of venue, and in the denial of his motion for severance by the Criminal (Court) of record for Polk County, Florida, the petitioner was denied due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States."[1]

As has been stated, no testimony was offered before the district court, but its judgment was based upon the petition for habeas corpus and respondent's return to the writ and the exhibits thereto. Those exhibits include the original record and the trial proceedings in the Criminal Court of Record for Polk County, Florida, wherein the appellee was convicted, contained in ten volumes of more than 1800 legal size typewritten pages, "Exhibit A" to the motion for change of venue filed in evidence at the hearing of said motion showing photostatic copies of newspaper articles, and other original exhibits. Appellee's conviction had been affirmed by the Supreme Court of Florida, *Blackburn v. State*, 83 So. 2d. 694, and the United States Supreme Court had denied certiorari, *Blackburn v. Florida*, 350 U.S. 987.

Prior to the conviction upon which he is now imprisoned, appellee had been convicted in the same state court of conspiracy to violate the lottery laws of the state, and had been sentenced to pay a $500.00 fine and to im-

---

1 The record contains no more detailed findings of fact or conclusions of law to sustain this general finding. In fairness to the district court, however, it should be pointed out that its attention was directed by the appellant primarily to the defense that the appellee had not exhausted his state remedies, and that in view of the decision in Brown v. Allen, 344 U.S. 443, that defense has been abandoned on appeal.

prisonment in the county jail for one year. Thereafter, the same lottery transactions were made the subject of a six count information against the appellee and twenty-three other defendants charging them with the commission of various substantive offenses under the lottery laws of Florida. Prior to appellee's trial, a number of his co-defendants had been eliminated, so that he was actually tried along with seven co-defendants on five of the six counts.

The question is presented as to whether there was such improper joinder that the appellee was denied due process of law when neither his motion to quash the information nor his motion for severance was sustained. It may be conceded, as the appellee so strenuously argues, that from the face of the information alone it would appear that distinct and separate offenses, committed in several counties, were charged against different persons, and that the information itself shows no connection between the several offenses nor between the various co-defendants. So far as those objections go to the propriety of the information as a pleading, this Court is concluded by the decision of the Supreme Court of Florida, subject to review under the due process clause only if it resulted in the denial to the appellee of fundamental fairness.[2] The appellee doubtless knew from the evidence theretofore introduced in the conspiracy trial what the state claimed to be the connecting links between the various offenses and the several offenders. The state's evidence upon the trial of the defendant and his co-defendants for

---

2 Dimmick v. Tompkins, 1904, 194 U.S. 540, 552; Kepner v. United States, 1904, 195 U.S. 100; Knewel v. Egan, 1925, 268 U.S. 442; Snyder v. Massachusetts, 1934, 291 U.S. 97; Palko v. Connecticutt, 1937, 302 U.S. 319; Betts v. Brady, 1942, 316 U.S. 455.

the several substantive offenses clearly went to prove that there was but one vast lottery operation, covering several counties, operated, backed and banked by the appellee. No further discussion is needed to demonstrate that there was no such misjoinder of parties or of offenses as to amount to a denial of due process of law or equal protection of the laws.

As to the motion for change of venue, we repeat that no evidence was offered before the district court which had not already received the consideration of the trial court and of the Supreme Court of Florida. The trial court entered an order denying the motion for change of venue, stating sound reasons for such denial, and carefully providing for its reconsideration in the event of difficulty in selecting a fair and impartial jury.[3]

---

[3] "The application for a change of venue filed herein on behalf of the defendant, Harlan Blackburn, coming on before the Court for hearing on the application as filed and the exhibits and affidavits made a part thereof and the response thereto filed by the State together with the supporting affidavits attached to and made a part of said response; and counsel for the defendant and for the State having announced that they had no further testimony to offer and were submitting the issue on the application and response; and the Court having taken the matter under advisement and having carefully considered the affidavits and exhibits filed herein, finds:

"That during the month of March, 1953, the defendant, Harlan Blackburn, was before this Court in Case No. 14960 under an information containing several counts, the first count being one of conspiracy and the other counts charging a violation of the lottery laws by various manners and means; that this case consumed 9 days in the trial thereof and during the course of the trial it was discovered that all of the counts charging a violation of the lottery laws were void and were withdrawn from the consideration of the Court at that time and the trial thereafter proceeded on the conspiracy count; that the present case is based on the same set of circumstances which gave rise to the bolita counts in the previous case and that practically the identical testimony used by the State in the conspiracy charge will be used in this case; that most of the newspaper articles referred to in the application for change of venue had already been published at the time the jury was selected in the conspiracy case and that no difficulty was experienced whatsoever in the securing of a jury in that case, accepted by the defendant as being without bias or prejudice and that the Court does not now therefore anticipate that there will be any difficulty when

The prospective jurors were examined at length on voir dire and twenty-six of them were excused as having fixed opinions. The six jurors finally selected had read of the case and heard it discussed but testified on voir dire that they had no fixed opinions and that they would give the defendants a fair and impartial trial. There was no unusual difficulty in choosing the jury. When the appellee renewed his motion for change of venue after the jury had been chosen and before it was sworn, the trial court ruled: "The Court is not of the opinion there has been any showing made here that it would be impossible for the defendant to secure a fair and impartial trial in this County, and the motion, therefore, is denied."

The Supreme Court of Florida attached little importance to the motion for change of venue, or for that matter to the motion to quash the information or the motion for severance, and disposed of all three in one sentence concluding its opinion:

---

the jury is selected for the trial of the instant case in the securing of six jurors who will be absolutely unbiased, without prejudice and fair and impartial as between the rights of the defendant and the State of Florida.

"The Court further finds that no showing is made on the records as now submitted such as would justify the conclusion that a fair and impartial jury can not be secured in Polk County, Florida, for the trial of the issues involved herein.

"IT IS THEREFORE ORDERED that the application of the defendant, Harlan Blackburn, for a change of venue, be, and it is hereby denied, and it is further provided that if it should appear to the Court during the selection of a jury herein that it is not possible to secure a jury for the trial of this cause who stands unbiased and unprejudiced and absolutely qualified to sit as jurors therein, and that a change of venue would serve the ends of justice that the Court will at that time give due consideration to any motion for a change of venue.

"DONE AND ORDERED at Bartow, Florida, this the 30th day of October, 1953.

(S) R. H. Amidon
Judge"

> "We have considered all other assignments of error and are not persuaded that the trial court committed reversible error in entering the judgment and sentence appealed from."

Blackburn v. State, Fla. 83 So. 2d. 694, 696.

Whether the adverse publicity prevented the appellee from securing a fair trial was a question primarily addressed to the judgment of the trial court. There was more than substantial evidence to support its decision. It properly accorded weight to the examination of the jurors on voir dire and to the lack of difficulty in choosing a jury. 22 C.J.S., Criminal Law, § 196 b, pp. 312, 313. It was on the ground at the time of trial; it saw and heard the voir dire examination of the jurors; it was in much better position to know the local sentiment and to hear and decide the motion for change of venue than was the federal district court.

The trial judge and the State Supreme Court Justices all acted pursuant to their oaths to support the Constitution of the United States. Article VI, Clause 3 of the Constitution. The state courts "are under the same duty as the federal courts to respect rights under the United States Constitution." *Brown v. Allen*, 344 U.S. 443, 449. The careful inquiry evidenced by this record does not, in our opinion, present such an extreme case as might justify a federal court in holding that the state trial court and Supreme Court have denied the appellee due process of law or any other constitutional right. See *Shepherd v. Florida*, 341 U.S. 50.

The judgment of the district court is therefore re-

versed with direction to enter judgment for the respondent. 28 U.S.C.A. §2106.

REVERSED WITH DIRECTIONS.

A true copy

Test: EDWARD W. WADSWORTH

(Circuit Court Seal)

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

JUDGMENT

Extract from the Minutes of December 30, 1957.

No. 16681

NATHAN MAYO, as Custodian of the State Prison, State of Florida

versus

HARLAN BLACKBURN

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed with direction to enter judgment for the respondent, Nathan Mayo, as Custodian of the State Prison, State of Florida;

It is further ordered and adjudged that the appellee, Harlan Blackburn be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX B

Opinion and Judgment of the Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1955

SPECIAL DIVISION A.

Harlan Blackburn, Appellant, -vs- State of Florida, Appellee.	Case No. 26,218
Lawrence Wall and Sing Wall, Appellants, -vs- State of Florida, Appellee.	Case No. 26,219
Phillip Lino, Douglas Troutman, and Hattie Eads, Appellants, -vs- State of Florida, Appellee.	Case No. 26,220

Opinion filed June 3, 1955

Appeals from the Criminal Court of Record for Polk County, R. H. Amidon, Judge

John R. Parkhill, Whitaker Brothers, Mark R. Hawes and Sam E. Murrell, Sr., for Appellants

Richard W. Ervin, Attorney General, and Bart L. Cohen, Assistant Attorney General, for Appellee.
SEBRING, J.:

Harlan Blackburn and certain other defendants were tried in the Criminal Court of Record of Polk County, Florida, for a violation of the criminal laws. The information upon which the prosecution was based charged the defendants in five separate counts with (1) conspiracy to violate the lottery laws, (2) promoting a lottery, (3) aiding and assisting in the promotion of a lottery, (4) possession of lottery paraphernalia, and (5) selling and offering lottery tickets for sale. During the course of the trial the court withdrew from the consideration of the jury counts 2 to 5, inclusive, and submitted to the jury count 1 charging conspiracy to violate the lottery laws. The jury found Blackburn guilty on the conspiracy count and the court adjudged the defendant guilty on said count and sentenced him to a $500 fine and imprisonment in the county jail for a period of one year.

Subsequently, the county solicitor of Polk County filed a six-count information against Blackburn and certain other defendants, in which Blackburn was charged with (1) promoting a lottery, (2) assisting in setting up a lottery, (3) possession of lottery paraphernalia, (4) sale of lottery tickets, (5) transmitting lottery tickets, and (6) attempting to operate a lottery. Blackburn moved to quash the information on the ground, among others, that the conspiracy count upon which he had previously been convicted related to the identical lottery transaction charged in the second information and that consequently the State was barred, under principles of "former jeopardy and . . . res adjudicata,"

from prosecuting the defendant for the crimes charged in the second information. The trial court denied the motion to quash and the cause proceeded to trial on the merits. The jury found the defendant guilty on each count of the information, the trial court pronounced judgment and imposed sentence, and this appeal followed.

The main question on the appeal is whether or not the trial court committed reversible error in refusing to grant the motion to quash on the ground of former jeopardy.

The law is uniform and well established that "punishment for a conspiracy to commit a crime and for the overt act which is the object of the conspiracy does not constitute double punishment," or double jeopardy, even where the substantive offense is the overt act involved in the conspiracy charge. 15 Am. Jur., Criminal Law, section 385, p. 60, 1954 supp., p. 13; 22 C. J. S. 432; anno. 92 L. Ed. 198; U. S. v. Wexler, 79 F. 2d 528; Pinkerton v. U. S., 328 U. S. 640, 66 S. Ct. 1180. The rule rests on the principle that the commission of a substantive crime and a conspiracy to commit the substantive crime are separate and distinct offenses. Brown v. State, 130 Fla. 479, 178 So. 153.

In support of his position that the prosecution under the second information was barred by reason of the former trial and conviction, the appellant cites Williams v. State (Fla.), 69 So. 2d 766, and its companion, Young v. State (Fla.), 69 So. 2d 761, which, he contends, squarely hold that conspiracy to violate the lottery laws is not an independent substantive offense for which a defendant may be prosecuted and punished separately.

In Williams v. State the defendant Williams was tried and convicted in the Criminal Court of Record of Polk County of certain criminal offenses charged in a six-count information. One count charged the defendant with conspiracy to violate the lottery laws. Section 833.01, Florida Statutes 1951. Two counts charged the defendant with the commission of certain felonies under the lottery law. Section 849.09, subsections 1 (a) and (b), Florida Statutes 1951. The remaining counts charged the defendant with the commission of certain misdemeanors under the lotttery laws. Section 849.09, subsections 1 (g) and (h), Florida Statutes 1951.

On the appeal to this court from the judgment and sentence the holding of this Court was two-fold: (1) "Where a defendant is convicted *under the lottery laws*, section 849.09, F. S., . . . on two or more counts involving both misdemeanors and felonies, only one sentence is applicable" (emphasis supplied); (2) though the Supreme Court of Florida has jurisdiction to review felony convictions, by reason of the provisions contained in section 5, Article V, of the Constitution, it has no power to review misdemeanor convictions, this power being vested in the circuit courts under the provisions of section 11, Article V, of the Constitution; therefore this Court was without jurisdiction to deal with the judgment and sentence appealed from, so far as it pertained to the misdemeanor charges contained in the information "except to order a proper judgment or sentence by reason of the fact that misdemeanors and felonies are charged in different counts of the same information charging variations of only one offense." Nowhere in the opinion was there an adjudication that the count for *conspiracy* to violate the lottery laws, which is an offense only because of the existence of

the general conspiracy statute, section 833.01, Florida Statutes 1951, was regarded by this Court as stating a variation of the substantive lottery violation charged in the other counts of the information, which were punishable only under section 849.09, Florida Statutes 1951.

Under these circumstances, we think it clear that the Williams case cannot be construed as negating or overruling the principle established by an earlier decision of this Court, to the effect that as a general rule a prosecution under the statutes penalizing a conspiracy to violate certain criminal laws of the state constitutes a charge of an independent offense and not merely a variation of the substantive offense which the defendant conspired to commit. Brown v State, supra.

While it must be conceded that certain language of the opinion in the companion case of Young v. State, supra, tends, at first reading, to sustain appellants' position, such as, for example, the blanket statement that "the information in this case was with reference to *the same criminal transactions*," it seems clear from a careful consideration of these comments in context that the conspiracy charge was not under consideration at that point of the opinion, as is evidenced by succeeding references in the opinion to the various counts in question as charging commission of acts "embraced within the alternative provisions of the (lottery) statute." p. 762, 763. (Emphasis supplied) And the Court was necessarily governed, in its final conclusions as to the validity of the judgment and sentence before it for review, by the principles of the limited scope of review acknowledged in the Williams case, supra, since the issues involved in the two appeals were precisely the same.

We have considered all other assignments of error and are not persuaded that the trial court committed reversible error in entering the judgment and sentence appealed from.

Affirmed.

DREW, C. J., TERRELL, J., and FLOYD, Associate Justice, CONCUR.

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above and foregoing pages numbered from 1 to 5 inclusive, constitute a true and correct copy of the Opinion and Judgment of the Supreme Court of Florida filed June 3rd, 1955, in that certain cause recently pending in said Court wherein Harlan Blackburn was Appellant and The State of Florida was Appellee, all as the same appears among the records and files of my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 3rd day of November, 1955.

/s/ GUYTE P. McCORD
Clerk of the Supreme Court of Florida.

APPENDIX C

The Charging Document On Which Petitioner Was Tried

"In the name and by Authority of the State of Florida: —

CLIFTON M. KELLY, County Solicitor for the County of Polk, prosecuting for the State of Florida in said County, under oath, information makes that HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL on the 1st day of April, A. D., 1952, and at divers other times between the 1st day of April, A. D., 1952, and the 22nd day of September, A. D., 1952, did in Polk County, Florida, unlawfully set up, promote and conduct a lotttery for money which said lottery is commonly known as Cuba and bolita; that said offense was committed at the said time by HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL partly in Osceola County, Florida, Orange County, Florida, Hillsborough County, Florida, and DeSoto County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that FRANK DUSKIN on the 1st day of April, A. D., 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully set up, promote and conduct a lottery for money, which said lottery is

commonly known as Cuba and Bolita; that said offense was committed at said time by FRANK DUSKIN partly in Osceola County, Florida, Orange County, Florida, and Hillsborough County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that GERALDINE BERRY on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D., 1952, and the 22nd day of September, A. D. 1952, did in Polk County, Florida, unlawfully set up, promote and conduct a lottery for money which said lottery is commonly known as Cuba and Bolita; that said offense was committed at said time by GERALDINE BERRY partly in Hillsborough County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida;

COUNT 2

CLIFTON M. KELLY, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, further charges that HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did in Polk County, Florida, unlawfully aid and assist in the setting up and promoting and conducting a lottery for money, which said lottery is commonly known as Cuba and bolita, and the said HAR-

LAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL were interested in and connected with the said lotttery, which said lottery is commonly known as bolita and Cuba; that said offense was committed at said time by HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL partly in Osceola County, Florida, Orange County, Florida, Hillsborough County, Florida and DeSoto County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that FRANK DUSKIN on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully aid and assist in the setting up and promoting and conducting of a lottery for money, which said lottery is commonly known as Cuba and bolita, and the said FRANK DUSKIN was interested in and connected with the said lottery, which said lottery is commonly known as bolita and Cuba; that said offense was committed at said time by FRANK DUSKIN partly in Osceola County, Florida, Hillsborough County, Florida and Orange County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that ELOUISE BROADNAX, HATTIE EADS, LAURA MERRITT, ELIZABETH ROBERTS, MAYZENE BROWN, AGNES HESTER BRUNDRIDGE, ELOUISE

MILLER, IRA MILLER also known as ERA MILLER also known as IVERY MILLER, ARTHUR WILLIAMS, JESSIE MAE GOLDWIRE, ANNIE MAE ROBINSON, DOUGLAS TROUTMAN, WALLACE WILSON, M. D. LEE, JOHN HENRY SPEED and PHILIP LINO on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did in Polk County, Florida, unlawfully aid and assist in the setting up and promoting and conducting of a lottery for money, which said lottery is commonly known as Cuba and bolita, and the said ELOUISE BROADNAX, HATTIE EADS, LAURA MERRITT, ELIZABETH ROBERTS, MAYZENE BROWN, AGNES HESTER BRUNDADGE, ELOUISE MILLER, IRA MILLER also known as ERA MILLER also known as IVERY MILLER, ARTHUR WILLIAMS, JESSIE MAE GOLDWIRE, ANNIE MAE ROBINSON, DOUGLAS TROUTMAN, WALLACE WILSON, M. D. LEE, JOHN HENRY SPEED and PHILIP LINO were interested in and connected with the said lottery, which said lottery is commonly known as bolita and Cuba, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that GERALDINE BERRY and SAM CAGNINA on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully aid and assist in the setting up and promoting and conducting of a lottery for money, which said lottery is commonly known as Cuba and bolita, and the said GERALDINE BERRY and SAM CAGNINA were interested in and connected with the said lottery, which said lottery is commonly known as bolita and Cuba; that said offense was committed at

the said time by the said GERALDINE BERRY and SAM CAGNINA partly in Hillsborough County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida;

COUNT 3

CLIFTON M. KELLY, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, further charges that HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL on the 1st day of April, A. D., 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully have in their possession implements and devices for conducting a lottery for money, which said lottery is commonly known as bolita and Cuba, the said implements and devices consisting of lottery tickets, carbon copies of lottery tickets, lottery pads, check-up sheets, books and records, said implements and devices being a part of the paraphernalia for the conducting of the aforesaid lottery and the said HARLAN BLACKBURN alais THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL were then and there interested in the conducting of the aforesaid lottery and possessed said implements and devices for said purposes; that said offense was committed at said time by HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT

also known as CECIL REDDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL partly in Osceola County, Florida, Orange County, Florida, Hillsborough County, Florida and DeSoto County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that ELOUISE BROADNAX, HATTIE EADS, LAURA MERRITT, ELIZABETH ROBERTS, MAYZENE BROWN, AGNES HESTER BRUNDRIDGE, ELOUISE MILLER, IRA MILLER also known as ERA MILLER also known as IVERY MILLER, ARTHUR WILLIAMS, JESSIE MAE GOLDWIRE, ANNIE MAE ROBINSON, DOUGLAS TROUTMAN, WALLACE WILSON, M. D. LEE, JOHN HENRY SPEED and PHILIP LINO on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully have in their possession implements and devices for conducting a lottery for money, which said lottery is commonly known as bolita and Cuba, the said implements and devices consisting of lottery tickets, carbon copies of lottery tickets, lottery pads, checkup sheets, books and records, said implements and devices being a part of the paraphernalia for the conducting of the aforesaid lottery, and the said ELOUISE BROADNAX, HATTIE EADS, LAURA MERRITT, ELIZABETH ROBERTS, MAYZENE BROWN, AGNES HESTER BRUNDRIDGE, ELOUISE MILLER, IRA MILLER also known as ERA MILLER also known as IVERY MILLER, ARTHUR WILLIAMS, JESSIE MAE GOLDWIRE, ANNIE MAE ROBINSON, DOUGLAS TROUTMAN, WALLACE WILSON, M. D. LEE, JOHN HENRY

SPEED and PHILIP LINO were then and there interested in the conducting of the aforesaid lottery and possessed said implements and devices for said purposes, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that FRANK DUSKIN on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully have in his possession implements and devices for conducting a lottery for money, which said lottery is commonly known as bolita and Cuba, and said implements and devices consisting of lottery tickets, carbon copies of lottery tickets, lottery pads, check-up sheets, books and records, said implements and devices being a part of the paraphernalia for the conducting of the aforesaid lottery and the said FRANK DUSKIN was then and there interested in the conducting of the aforesaid lottery and possessed said implements and devices for said purposes; that said offense was committed at said time by FRANK DUSKIN partly in Osceola County, Florida, Orange County, Florida, and Hillsborough County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that SAM CAGNINA on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully have in his possession implements and devices for conducting a lottery for money, which said lottery is commonly known as bolita and Cuba, the said implements and devices consisting of lottery tickets, carbon copies of lottery tickets, lottery pads, check-up

sheets, books and records, said implements and devices being a part of the paraphernalia for the conducting of the aforesaid lottery, and the said SAM CAGNINA was then and there interested in the conducting of the aforesaid lottery and possessed said implements and devices for said purposes; that said offense was committed at said time by SAM CAGNINA in Hillsborough County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida;

COUNT 4

CLIFTON M. KELLY, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, further charges that HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully sell and offer for sale tickets, coupons and shares in a lottery for money commonly known as Cuba and bolita; that said offense was committed at said time by HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL partly in Osceola County, Florida, Orange County, Florida, Hillsborough County, Florida, and DeSoto County, Florida, as well as in said Polk County, Florida, contrary to the form of

the statute in such case made and provided and against the peace and dignity of the State of Florida; and that GERALDINE BERRY on the 1st day of April, A. D. 1952 and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully sell and offer for sale tickets, coupons and shares in a lottery for money commonly known as Cuba and bolita; that said offense was committed at said time by GERALDINE BERRY partly in Hillsborough County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that ELOUISE BROADNAX, HATTIE EADS, LAURA MERRITT, ELIZABETH ROBERTS, MAYZENE BROWN, AGNES HESTER BRUNDRIDGE, ELOUISE MILLER, IRA MILLER also known as ERA MILLER also known as IVERY MILLER, ARTHUR WILLIAMS, JESSIE MAE GOLDWIRE, ANNIE MAE ROBINSON, DOUGLAS TROUTMAN, WALLACE WILSON, and M. D. LEE on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully sell and offer for sale tickets, coupons and shares in a lottery for money commonly known as Cuba and bolita, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida:

COUNT 5

CLIFTON M. KELLY, County Solicitor for the County of Polk, prosecuting for the State of Florida in

the said County, under oath, further charges that HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully transmit lottery tickets, coupons and shares in a lottery for money, commonly known as Cuba and bolita; that said offense was committed at said time by HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDDICK, NORMA BRIDGES, LAWRENCE WALL and SING WALL partly in Osceola County, Florida, Orange County, Florida, Hillsborough County, Florida, and DeSoto County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that JOHN HENRY SPEED on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully transmit lottery tickets, coupons and shares in a lottery for money, commonly known as Cuba and Bolita, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that GERALDINE BERRY on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully transmit lottery tickets, coupons and shares in a lottery for money, commonly known as Cuba and

bolita; that said offense was committed at said time by GERALDINE BERRY partly in Hillsborough County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida; and that FRANK DUSKIN on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully transmit lottery tickets, coupons and shares in a lottery for money, commonly known as Cuba and bolita; that said offense was committed at said time by FRANK DUSKIN partly in Osceola County, Florida, Orange County, Florida, and Hillsborough County, Florida, as well as in said Polk County, Florida, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida;

COUNT 6

CLIFTON M. KELLY, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, further charges that HARLAN BLACKBURN alias THOMAS DAVIS, JOHN CECIL REDDITT also known as CECIL REDDITT also known as CECIL REDDICK on the 1st day of April, A. D. 1952, and at divers other times between the 1st day of April, A. D. 1952, and the 22nd day of September, A. D. 1952, did, in Polk County, Florida, unlawfully attempt to operate and conduct a lottery for money, which said lottery is commonly known as bolita and Cuba, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida."

Office - Supreme Court, U.S.
FILED
APR 16 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

CLAUDE PEPPER
WALTER A. APFELBAUM
37 N. E. First Avenue
Miami, Florida

PAT WHITAKER, TOM WHITAKER,
MARK R. HAWES
308 Tampa Street
Tampa, Florida
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

This Reply Brief will examine some of the arguments adduced by the Respondent in his "Brief In Opposition to Granting Writ of Certiorari." In the course of the reply, that Brief will be denominated "RB." As in the original petition, references to the transcript of the trial proceedings will be denominated "TR", and references to the Record in the United States Court of Appeals for the Fifth Circuit, will be denominated "R".

It should be clarified at the outset that Respondent's efforts to categorize the charging document (Question one of the original Petition for Writ of Certiorari) as being within the framework of the legal questions presented repeatedly before the Supreme Court of Florida, in the cases cited at "RB" page eight, are illusory. Petitioner has never contended that the alternative provisions of the Florida Lottery Statute (Section 849.09, Florida Statutes 1957) are violative of due process or that an indictment based thereon is similarly faulty. Nor has Petitioner ever complained that those jointly charged with him, through their joinder, created a violation of the Fourteenth Amendment. Rather, Petitioner asserts that the fundamental constitutional violation goes to the issue of misjoined defendants and, pari passu, the offenses these defendants committed. It is not the prolixity or inartfulness nor the multi-count facets of the indictment that raised the issues which this Court should resolve. It is the fact that other defendants are charged in this document who have committed, so far as the document itself reveals, a crime different from that with which Petitioner was charged. This misjoinder is the crux of the first question of the Petition for Writ of Certiorari.

Nor does any "fair interpretation" of the charging instrument as a whole demonstrate any connection between the misjoined defendants and Petitioner (RB 8). As an examination of the several counts (App. 15 of Petition) reveals, individuals were charged with Petitioner who allegedly committed distinct and separate crimes in two counties and four counties, whereas Petitioner was charged with a different crime that had a nexus in five counties. There is, it is true, a necessary similarity in phraseology used in identifying the offenses charged, but

the information per se establishes no connection between the misjoined defendants and Petitioner. There is no allegation of conspiracy or concert of action, nor involvement of each with the crimes of the other in any way. Essentially, Respondent seems not to grasp the real question here presented. The question here is not whether several people who have engaged in the several facets of the operation of a lottery may be jointly charged and tried for such offense. The question here is whether it is a denial of due process of law under the United States Constitution for a state to charge and bring to a single trial several different defendants upon separate, unrelated and distinct charges in the various counts of a criminal information. Subsidiary to this question is the further question of whether, when defendants separately charged with separate and distinct offenses in the various counts of a criminal information are later tried in a state court jointly as principals in the commission of a single offense (operation of a huge lottery allegedly permeating much of central Florida), there is such a fatal variance between the charge and the proof as to amount to a denial of due process of law under the Constitution of the United States.

Petitioner's claim as a result of being forced to trial under the charging instrument here involved is not simply that "guilt spilled over on him" (RB 9). The various factors that contributed to the Petitioner's prejudice are alluded to on page 10 of the Petition. As to the argument that the "brains" of the lottery could hardly be prejudiced by being tried with his hired help (RB 9), the simple answer is that the trial of multi-defendants in the context that existed at the trial of Petitioner resulted in a reciprocal inter-reaction that affected all so far as the psychological implications of rub-off guilt are concerned.

Petitioner has asserted that the standards used by the Fifth Circuit in demanding proof of active prejudice and reasoning as it did constituted an erroneous departure from procedural due process of law. Petitioner does not believe that established controlling principles enunciated in the cases cited at page 9 of the Reply Brief would in any sense be subverted by a reversal of the judgment of the Fifth Circuit. Contrariwise, these principles would be vitalized anew. The question before this Court, if the Petition is granted, will be whether the standard of due process in the Fourteenth Amendment as enunciated in the cases on page 9 of the Reply Brief and throughout the history of the application of the due process concept, vitiates Petitioner's conviction. Petitioner urges not merely that due process is violated by a charging document and subsequent joint trial thereon such as obtained in this case, but also that examination of the problem affords this Court an opportunity to explore in a meaningful way the implications of due process (See Petition p. 9) and to correct what appears to be an overly rigid standard of adjudication that has arisen in this area (Petition p. 12). Procedurally in every aspect this case is ripe for adjudication by this Court and an appropriate factual configuration is present. Appropriate objections were urged throughout. This Court should decide the question.

A trial in an area infected with adverse opinion which permeates the thinking of substantially all the populace can render nugatory any concept of fairness. This is an important question and this case presents suitable facts for consideration of the issue.

Ninety-seven articles of an emotional nature were printed over a two-year period condemning Petitioner's conduct in one aspect or another and branding him a criminal. Respondent asserts that one year elapsed between the date of publication of most of these articles and the time of the trial (RB 9-10). In fact, the newspaper deluge commenced again as the trial was about to begin and almost one-third of the total of the articles were published immediately prior to the trial. The effect of these front-page headline accounts was to reinstate the whole sequence of the other articles that had appeared. Included in this new series was the heinous accusation that Petitioner had brought about a man's assassination. Surely the total effect of this re-awakened and re-enforced onslaught was to deny a fair trial.

The Respondent raises what appears to be a quasi-estoppel argument, asserting that Petitioner brought about some of the publicity himself by fleeing the jurisdiction. Whatever the catalyst of the publicity, it is the fact that it existed and not its causal source that is important. As the Respondent knows, Petitioner left Florida and resisted extradition because of his physical fear of the incarcerating authority, the Sheriff of Polk County, Florida. When this Sheriff was defeated in his campaign for election, the Petitioner voluntarily surrendered; moreover, Petitioner had offered to surrender to any Sheriff but the then Polk County Sheriff, an offer which was refused. In this connection it should be mentioned that the sophistry (RB 11) that because the candidate for Sheriff with whom Petitioner was friendly was elected, Petitioner could not have been ill-regarded by the citizenry of Polk County, is meaningless. The multi-faceted circumstances of the election are not before this Court. The ver-

ified venue motion, non-traversed by the Respondent, is (TR p. 167-168). This motion related that Petitioner, or the charges against him, had been made a political football in the race for Sheriff of Polk County, and this factor can hardly be questioned.

Similarly, Petitioner in the verified venue motion, non-traversed as to this fact also by the Respondent, was asserted to have been depicted as a criminal preying on the working people of Polk County in the operation of one of the most diabolical gangs infesting society (Petition 6). The name of the gang, the Mafia, may not appear in the Record (See RB 12), but this fact was included for its informational value and certainly every one at the trial stage, at least, was aware of the label.

The Respondent has chosen in his legal argument on the publicity question (RB 10), the polemical technique of contrasting cases which were reversed because of adverse publicity surrounding the trial with the facts of the instant case. Petitioner does not believe that the limits of the adverse publicity thesis, insofar as that thesis relates to denial of a fair trial, are marked by the mob domination cases such as *Shepherd v. Florida* or the extraordinary circumstances of the *Juelick* case where each juror had sworn that he had an opinion that the defendant was guilty prior to the trial. Surely less sensational but nevertheless prejudicial factors create a situation where a fair trial cannot be held. Once again, Petitioner urges that if the Petition for Writ of Certiorari is granted, the facts of this case are such that a reversal should ensue because of the denial. Of primary concern, however, at this stage of the proceedings is that this case presents an appropriate congeries of circumstances for this Court to consider the im-

portant question of whether a fair trial was denied Petitioner because of a failure to grant change of venue. Procedurally, (see Petition 13-14) and otherwise, the case is ripe for adjudication and within its framework appropriate guides for the jurisprudence of the future can be formulated.

CONCLUSION

For the foregoing reasons and on the basis of the factors adduced in the Petition for Writ of Certiorari, the Writ should be granted in this case.

Respectfully submitted,

CLAUDE PEPPER
WALTER A. APFELBAUM

PAT WHITAKER
TOM WHITAKER
MARK R. HAWES
Counsel for Petitioner

PROOF OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply to Respondent's Brief in Opposition to Granting Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 15 day of April, 1958, to Richard W. Erwin, Attorney-General of the State of Florida, Attorney for Respondent, at his offices in Tallahassee, Florida.

Claude Pepper

CLAUDE PEPPER

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
APR 5 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

RICHARD W. ERVIN
Attorney General
Capitol Building
Tallahassee, Florida

GEORGE E. OWEN
Assistant Attorney General
Capitol Building
Tallahassee, Florida

Counsel for Respondent

INDEX

	Page
STATEMENT	1
FACTS ON THE TRIAL	2
QUESTIONS PRESENTED	6
REASONS FOR DENYING THE WRIT	7
THE VENUE QUESTION	9
CONCLUSION	12
CERTIFICATE OF SERVICE	13

CASES CITED

	Page
Adams v. State, Fla., 66 So. 2d 598	8
Betts v. Brady, 316 U. S. 455, 86 Law Ed. 1594, 62 Sup. Ct. 1252	9
Blackburn v. State, Fla., 83 So. 2d 694	8
Blackburn v. State of Florida, 350 U. S. 987, 100 Law Ed. 854, 76 Sup. Ct. 473	7
Bueno v. State, 40 Fla. 160, 23 So. 862	8
Fletcher v. State, Fla., 65 So. 2d 845	8
Gaskins v. State, Fla. 89 So. 2d 867	8
Houchins v. State, 154 Fla. 283, 17 So. 2d 82 (1944)	7
Johnson v. State of Florida, 112 Fla. 189, 150 So. 278	10
Juelick v. United States, 214 Fed. 2d 950, Fifth Circuit	10
Kepner v. United States, 195 U. S. 100, 49 Law Ed. 114, 24 Sup. Ct. 797	9
Lisenba v. California, 314 U. S. 219, 86 Law Ed. 166	9
McElroy v. United States, 164 U. S. 76 (1896)	7
Nelson v. State, Fla., 83 So. 2d 687	8
Palko v. Connecticut, 302 U. S. 319, 82 Law Ed. 288, 58 Sup. Ct. 149	9
Shepard v. State of Florida, 341 U. S. 50, 71 Sup. Ct. 549	10
Sheppard v. Ohio, 352 U. S. 910, 1 Law Ed. 2d 119, 77 Sup. Ct. 118	10
Snyder v. Massachusetts, 291 U. S. 97, 78 Law Ed. 674, 54 Sup. Ct. 330, 90 A. L. R. 575	9
United States v. Calamaro, 354 U. S. 351, 1 Law Ed. 2d 1394, 77 Sup. Ct. 1338	3

OTHER AUTHORITIES CITED

Florida Statutes	
Section 849.09	8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

STATEMENT

The petition for habeas corpus in the United States District Court had attached as exhibits the original record and the trial proceedings in the Criminal Court of Record of Polk County, Florida, and the said original record has been separately certified to this Court.

In this brief references to this record will be denominated as "TR"; to the record of the Court below as "R", and to the appendix of the petition as "APP".

The situation of the parties as given in the petition is concurred in by the respondent.

FACTS ON THE TRIAL

In view of the fact that the rather lengthy record has not been printed, the respondent deems it necessary and of assistance to the Court to give a brief resume of the facts on the trial of the case.

The facts as revealed to the jury in the trial are that the petitioner, Harlan Blackburn, who lived in Orlando, Orange County, Florida, set up, operated and conducted a lottery known as "Cuba" or "Bolita" in several counties of the State of Florida adjacent to Orange County, Florida, to-wit: Osceola, Polk and Hillsborough counties. The petitioner, Blackburn, was tried, along with eight (8) other persons in a five-count information. During the course of the trial one John Henry Speed changed his plea of "not guilty" to that of "guilty"; however, out of an abundance of caution the trial court refused to make this fact known to the jury. (TR 1545)

According to the State's evidence the lottery known as "cuba" or "bolita" is carried on by the sale of chances on numbers from 1 to 100, both inclusive. The winning number on this lottery is determined each Saturday by taking the last two digits of the Grand Prize on the National Lottery at Havana, Cuba, which is broadcast between the hours of 2:00 and 4:00 P. M. on Saturday afternoon.

The organizational setup of the illegal lottery known as "cuba" or "bolita" is in the following manner:

At the top of the organization is the principal operator or the "banker" who finances the operation with his money and takes the profits, less the expenses, from the

operation. Beneath the banker are persons known as "check up" men or women, as the case may be, and underneath the check up men are "pick up" men or women, as the case may be, and beneath these people are the "sellers" or "writers" who contact and sell chances to the general public. The chances are sold during the week and on Saturday at approximately noon the writers tally up their sales, the "pick up" man contacts the "writer", picks up the record of the amount of business that the writer sold during the week and transmits this record, along with the cuba or bolita tickets to the "check up" man who, from the records of the writers furnished him by the "pick up" men, makes a final tally of the total amount of business done for the week and posts same on an "in and out" sheet, showing the gross business done and the total amount of money paid out due to "hits" or chances that have been purchased on the winning number. (TR 713-720). This operational setup is not unlike the one described by this Court in the case of *United States v. Calamaro, 354 U. S. 351, 1 Law Ed 2d 1394, 77 Sup. Ct. 1338.*

The "check up" man was paid a percentage of three (3%) per cent of the gross amount of business sold during the week. The "pick up" men received a straight salary of fifty ($50.00) dollars per week and expenses (gasoline and oil), and the "writers" or "sellers" received fifteen (15%) per cent of the total amount of tickets sold, or in their language, fifteen cents of each dollar of business sold. (TR 527, 539, 546)

In this particular lottery the evidence shows that petitioner, Harlan Blackburn, was the principal operator and banker; that Blackburn had as his "check up" man one

Frank Duskin of Polk County, who took his orders and instructions from the petitioner; that Duskin purchased two (2) automobiles for the "pick up" people at petitioner Blackburn's instructions and with money furnished by Blackburn and took title to the automobiles in his (Duskin's) name because petitioner, Blackburn, did not want the automobiles listed in his name (TR 489); that operating under Duskin from time to time were three (3) "pick up" people, John Henry Speed, who changed his plea from "not guilty" to "guilty" during the course of the trial, Lawrence Wall and his wife Sing Wall, all negroes. Duskin, a white man, pled guilty to the charges laid against him in the information and testified on behalf of the State. Cecil Redditt was granted a continuance and not tried with the petitioner. Redditt and Philip Lino, both white men, were persons sent by principal operator, petitioner, Blackburn, on a given Saturday to "check" on Frank Duskin, the "check up" man, for double security, or in the language of the business, to keep the "check up" man honest.

During the summer of 1952 for several Saturdays Frank Duskin had the "pick up" woman, Sing Wall, check the lottery tickets in to him at his home in Lakeland, Florida; later he changed the check up place to another point in Polk County, the "Blue Bird Cafe" and it was at this place on July 19, 1952, while Duskin and Philip Lino were checking up the results of the lottery sales that they were surprised by the then Constable, Pat Gordon, a man who was later elected Sheriff and other officers in a raid. On each Monday, around 1:00 P. M., Frank Duskin would take the profits from the lottery and an "in and out" sheet to the principal operator, the petitioner, Harlan Blackburn, and deliver it to him at Orlando, Orange County, Florida,

at the home of his girl friend, Norma Bridges. (TR 506-507); that after the raid by the Constable, Frank Duskin was directed by petitioner, Harlan Blackburn, to secure a "check up" place in Hillsborough County, that things in Polk County were too hot; that in accordance with this instruction Duskin secured permission from a negro woman named "Geraldine Berry" who lived on the edge of Hillsborough County, just over the Polk County line, to use one of her buildings for checking up the lottery business on Saturdays. He checked at this place and also at other places in Hillsborough County and notified the "pick up" people to bring the lottery paraphernalia to him at the new "check up" points in Hillsborough County, and as usual continued to check in the profits from the lottery, along with the "in and out" sheet to petitioner, Harlan Blackburn, each Monday at the designated place in Orlando, Orange County, Florida. (TR 874-880)

Frank Duskin, about September 1, 1952, after he and Philip Lino had been arrested by the Constable, decided to tell the law enforcement officers about the entire operation. (TR 897) From his testimony and assistance the officers secured search warrants for the homes and business places of a large number of the lottery writers or sellers and secured arrest warrants for other persons who were aiding and assisting in the operation of this lottery. On Saturday, the 20th day of September, a coordinated search was made by law enforcement officers of Polk County and other counties, particularly Hillsborough and Orange, which revealed a vast amount of lottery paraphernalia and brought about the arrest and finally the trial and conviction of petitioner, Harlan Blackburn, and his several co-defendants.

QUESTIONS PRESENTED

Petitioner presents two (2) questions which he states as follows:

> **1. Whether a conviction based on an information charging several defendants with per se unrelated, although similar crimes, without allegation of conspiracy or concert of action, nor involvement of each with the crimes of the other, and subsequent joint trial of said misjoined defendants, is subject to collateral attack as being violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States without regard to an affirmative showing of prejudice beyond what may be logically inferred from the nature of the proceedings.**
>
> **2. Whether it is a violation of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States for a state authority to proceed to trial over objection urged in an area which for two years had been infected with a hostile press campaign against the defendant, with approximately ninety seven emotionally toned articles, almost all stating or inferring defendant was a criminal, having been published.**

The respondent believes the sole question to be decided by this Court is substantially as follows:

> **1. WAS THE PETITIONER DENIED DUE PROCESS OF LAW AND EQUAL PRO-**

TECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE STATE TRIAL COURT DENIED HIS

(1) MOTION TO QUASH INFORMATION

(2) MOTION FOR CHANGE OF VENUE

(3) MOTION FOR SEVERANCE?

The United States Court of Appeals for the Fifth Circuit answered this question in the negative.

REASONS FOR DENYING THE WRIT

In principle the same question was presented to this Court on petition for certiorari to the Supreme Court of Florida, which petition was denied. *Harlan Blackburn v. State of Florida, 350 U. S. 987, 100 Law Ed. 854, 76 Sup. Ct. 473.*

The petitioner claims that the charging instrument misjoins the petitioner with other defendants and that the misjoinder is of such a degree that it should be held to be per se violative of due process. For this position he cites *McElroy v. United States, 164 U. S. 76 (1896); Houchins v. State, 154 Fla. 283, 17 So. 2d 82 (1944).*

The Houchins case, supra, contained two counts in the information. One count charged a violation of the uniform sales of securities act and the other charged embezzlement. The State admitted that the information contained two separate distinct and unrelated offenses.

Florida's lottery statute (Section 849.09) provides alternative provisions. The information in this case is in several counts, charging the offense to have been committed by different methods, embraced within the alternative provisions of the statute. The information was approved by the trial court (TR 56) and by the Supreme Court of Florida. *(Blackburn v. State, Fla., 83 So. 2d 694.)* See also *Wheeler v. State, Fla., 72 So. 2d 364; Fletcher v. State, Fla., 65 So. 2d 845; Gaskins v. State, Fla. 89 So. 2d 867; Nelson v. State, Fla., 83 So. 2d 687; Adams v. State, Fla., 66 So. 2d 598; Bueno v. State, 40 Fla. 160, 23 So. 862.*

A fair interpretation of the charging instrument as a whole clearly demonstrates that defendants were connected in the commission of the offenses charged and factually there is no misjoinder. This was the finding of the trial court in denying the motion to quash. (TR, General Index, page 11) The Circuit Court on this point said:

> ". . . The state's evidence upon the trial of the defendant and his co-defendants for the several substantive offenses clearly went to prove that there was but one vast lottery operation, covering several counties, operated, *backed and banked by appellee.* No further discussion is needed to demonstrate that there was *no such misjoinder of parties* or of offenses as to amount to a denial of due process of law or equal protection of the laws." (Emphasis supplied.)

The respondent does not believe that this Court is willing to substitute its established controlling principles

of "fair trial", "due process" and "equal protection" as announced in *Palko v. Connecticut, 302 U. S. 319, 82 Law Ed. 288, 58 Sup. Ct. 149; Kepner v. United States, 195 U. S. 100, 49 Law Ed. 114, 24 Sup. Ct. 797; Snyder v. Massachusetts, 291 U. S. 97, 78 Law Ed. 674, 54 Sup. Ct. 330, 90 A. L. R. 575; Betts v. Braay, 316 U. S. 455, 86 Law Ed. 1594, 62 Sup. Ct. 1252, Lisenba v. California 314 U. S. 219, 86 Law Ed. 166,* for some new recondite legal conception which is clearly theoretical in nature.

Petitioner objects to being tried with his co-defendants. Reduced to its simplest terms, petitioner's claim is that guilt spilled over on him because he was required to be tried with other persons interested in the same lottery. The respondent fails to see how the "banker", the principal operator and the "brains" of the lottery, the person who directed the overall activity and secured the profits therefrom, could be prejudiced by having to be tried as a co-defendant with his hired help. Certainly if any guilt in a case of this kind is going to spill over by association, the spilling over, if any, would be from petitioner to his agents or hired help.

THE VENUE QUESTION

As was pointed out by the trial court in its order denying a change of venue (APP "A", page 4) most of the newspaper articles attached to the motion had been printed prior to petitioner being tried and convicted for conspiracy to violate the lottery laws in March of 1953 and no difficulty was experienced in selecting a jury for that trial.

This case was tried in October, 1953, approximately one year after petitioner was arrested and long after most

of the newspaper articles were printed. Aside from this, petitioner by his own actions, fleeing the jurisdiction of the State and resisting extradition from the State of Texas, created a large amount of the publicity. The facts and circumstances relating to publicity surrounding this case cannot begin to compare with that surrounding *Shepard v. State of Florida, 341 U. S. 50, 71 Sup Ct. 549; Johnson v. State of Florida, 112 Fla. 189, 150 So. 278; Juelick v. United States, 214 Fed. 2d 950, Fifth Circuit; Sheppard v. Ohio, 352 U. S. 910, 1 Law Ed. 2d 119, 77 Sup. Ct. 118.*

Shepard v. Florida, supra, was a rape case. Four negroes were alleged to have raped a young white girl, seventeen years of age. Newspapers published as a fact that the defendant had confessed to the crime and attributed it to the sheriff. It was never denied, yet never introduced in evidence or produced in Court. The defendants' parents' home was burned amidst great disorder in the community. The case was reversed because the negro race had been discriminated against by the method of selecting a jury.

The *Johnson* case, supra, involved the murder of two police officers on Sunday, grand jury indicted on Monday and defendants immediately forced to trial amongst great and violent community sentiment, mobs assembled and demanded the defendants be turned over, National Guard called out and defendants transferred from one jail to another.

In *Juelick*, supra, a Deputy United States Marshal was murdered while transporting a prisoner. Every man on the jury had sworn that he had an opinion that the defendant was guilty prior to the trial. Nevertheless, the

trial proceeded and this Court held in the last two mentioned cases that either a change of venue or a continuance of the case for a cooling off period was in order.

In the case at bar, there was a long period of delay between the publishing of a majority of the newspaper articles and the time of the trial of the petitioner. This cooling off period amounted to a continuance and as the Circuit Court pointed out no difficulty was experienced in selecting a jury. To be sure, the twenty-six jurors who were excused for having fixed opinions were excused by the trial court. Petitioner was not required to use his peremptory challenges for that purpose.

The claim of prejudice against petitioner in his motion for change of venue that he had been rendered "odious" to the people of Polk County and that he and charges against him had been a "political football" in the sheriff's race is equally as unjustified as the claim of prejudice by adverse newspaper publicity. Facts and matters of which the trial court could and evidently did take judicial knowledge were that Pat Gordon, the candidate for sheriff, to whom the claim was made that petitioner was friendly, made the first arrest in Polk County of petitioner's agents, Duskin and Lino on July 19, 1952. Between that time and the date of the trial, October, 1953, notwithstanding petitioner's claim, Pat Gordon had been elected sheriff of Polk County by a large majority and was sheriff at the time of the trial of petitioner. (TR 540-541) This demonstrates beyond any doubt that the citizenry of Polk County, Florida, as a whole had not been prejudiced against this petitioner.

The Circuit Court stated sound reasoning on this matter thusly:

> "Whether the adverse publicity prevented the appellee from securing a fair trial was a question primarily addressed to the judgment of the trial court. ***There was more than substantial evidence to support its decision.*** It properly accorded weight to the examination of the jurors on voir dire and to the lack of difficulty in choosing a Jury. 22 C. J. S., Criminal Law, § 196 b, pp. 312, 313. It was on the ground at the time of trial; it saw and heard the voir dire examination of the jurors; it was in much better position to know the local sentiment and to hear and decide the motion for change of venue than was the federal district court." (Emphasis supplied.)

The respondent takes sharp issue with the flat statement on page 6 of the petition that petitioner had been depicted as the operator of a diabolical gang: (the *Mafia*). There is nothing in the record cited by petitioner to support this statement and nothing to warrant a reasonable conclusion of such fact.

CONCLUSION

The evidence in this case clearly demonstrated that there was but one vast lottery operation covering several counties, involving numerous persons. The activities of the lottery sellers or writers were generally limited to Polk County; others performing activities in several counties. The lottery operation was "backed" and "banked" by petitioner.

There was no unusual difficulty in selecting the jury.

The state trial court and the Supreme Court of Florida have not denied the petitioner due process of law or any other constitutional right.

We respectfully submit that the opinion and judgment of the Court of Appeals for the Fifth Circuit is eminently correct and this petition should be denied.

Respectfully submitted,

Richard W. Ervin
Attorney General

George E. Owen
Assistant Attorney General

Counsel for Respondent.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true copy of the foregoing Brief in Opposition to Granting Writ of Certiorari has been furnished to Honorable Claude Pepper, 37 N. E. First Avenue, Miami 32, Florida and Whitaker Brothers, 308 Tampa Street, Tampa, Florida, Attorneys for Petitioner, by mailing a copy of same to them at the above addresses, this the 14th day of April, A. D. 1958.

George E. Owen

George E. Owen

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAY 21 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

CLAUDE PEPPER
WALTER A. APFELBAUM
37 N. E. First Avenue
Miami, Florida

PAT WHITAKER, TOM WHITAKER
MARK R. HAWES
308 Tampa Street
Tampa, Florida
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For The Fifth Circuit

Petitioner prays that this Court grant rehearing of its Order of April 28, 1958, denying the Petition for a Writ of Certiorari, 26 L.W. 3309, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the Petition filed March 13, 1958.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. To preserve a brief exposition, and because it was felt that the reasons adduced were sufficient, Petitioner in the original Petition for a Writ of Certiorari did not discuss the peculiar problems presented by the fact that review is here sought on a case that originated as a habeas corpus attack on a state court conviction. The first part of this Petition will be directed to considerations that become material in light of this factor.

Congress has authorized the Federal courts to grant writs of habeas corpus under certain circumstances when a prisoner is detained by a state in violation of his federal constitutional rights, 28 U.S.C. Sec. 2241 (c)(3)(1952). This statute vests authority to grant the writ in the district courts, 28 U.S.C. Sec. 2241 (a)(1952).

The availability and scope of habeas corpus review in various contexts of denial of due process to state prisoners has been a vexing problem in terms of Federal-State relationships. Schaeffer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1 (1956); Note: *Federal Habeas Corpus for State Prisoners*, 55 Col. L. Rev. 196 (1956). The flood of frivolous attacks upon state court convictions, the feeling that it is unseemly for a single district judge to review the validity of the state court conviction often approved by the highest court of the state with certiorari denied by this Court, and the occasional interference with the administration of state criminal law are all factors that have led to a history of attempts at limiting federal habeas corpus. Thus, the attorneys general of over forty states joined with the attorney general

of Pennsylvania in urging that a district court habeas corpus action which sought to overturn a state court conviction was unconstitutional as violative of the Eleventh and Seventh amendments, *U.S. ex rel Elliot v. Hendricks* 213 F. 2d 992 (3rd Cir.); *Cert. Den.* 348 U.S. 851 (1954). Prior to this expression by the chief prosecuting officers of the executive arms of the state governments, the Conference of Chief Justices in 1952 adopted a resolution which stated that "Orderly Federal procedure under our dual system of government should require that a final judgment of a state's highest court be subject to review and reversal only by the Supreme Court of the United States." *The Conference of Chief Justices Resolution on Habeas Corpus* (Counsel of State Governments 1952). The culmination of these governmental attacks on federal habeas corpus was the abortive attempt at limiting legislation in the United States Congress, H.R. 5649 (84th Cong. 1st Sess. 1955) which passed the House but died in the Senate. The House has again, since the original Petition in this matter was submitted, passed a statute closely patterned after the previous H.R. 5649, H.R. 8361 (85th Cong. 2nd Sess. 1958). This Bill has not been acted upon by the United States Senate. This case, therefore, affords this Court an opportunity to clarify and express the current state of the law of federal habeas corpus at a time when such a pronouncement would be of inestimable aid to the Congress in formulating or deciding to by-pass a new law aimed at partially limiting federal habeas corpus jurisdiction.

The Committee report accompanying H.R. 8361 and the hearings before the Committee on the Judiciary on H.R. 5649 emphasize the negative aspects of federal habeas corpus relief which were summarized in the prior para-

graph H. Rep. No. 1293 (85th Cong. 2d Sess. 1958); Hearings on H.R. 5649 (85th Cong. 2d Sess. 1955). The problem is one of continuing and increasing importance in the delicate relationships of the federal system which are now being carefully re-examined. Amidst the numerous expressions of the need for limiting the scope of habeas corpus review the eloquent language of Judge Schaeffer urging the opposite point of view merits repetition.[1] It is respectfully urged that this Court should decide this case, correct the wrong done and in so doing clarify for mature legislative consideration the position in the federal courts of the great writ.

2. Habeas corpus reversal for different kinds of violations of federal constitutional rights have occurred in the past. However, it should be noted that the use of habeas corpus to test state convictions in terms of misjoinder in indictments and prevention of a fair trial by adverse publicity has not been subject to considered examination by this Court. The important issue of how far the writ extends, whether it encompasses these and other kinds of constitutional violations, could appropriately be decided upon the facts of the instant case.

---

[1] "The aim which justifies the existence of habeas corpus is not fundamentally different from that which informs our criminal law in general, that it is better that a guilty man go free than that any innocent one be punished. To the extent that the small number of meritorious petitions shows that the standards of due process are being honored in criminal trials, we should be gratified; but the continuing availability of the federal remedy is in large part responsible for the result. What is involved, however, is not just the enforcement of defined standards. It is also the creative process of writing specific content into the highest of our ideals. So viewed, the burdensome test of sifting the meritorious from the worthless appears less futile, and there is less room for the emotions of federalism." Schaeffer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 25 (1956).

3. The United States Court of Appeals for the Fifth Circuit did not consider these problems in its opinion, but directed its attention solely to the constitutional questions (App. "A" of original petition). Although Petitioner thus had the issues decided in his favor sub silentio, nevertheless these matters are urged as a basis for asserting that this is an important case in which this Court should grant Certiorari since it involves in all its aspects, and at a time when the issue has a significance it perhaps has never had before, the entire area of federal habeas corpus as applied to state court convictions.

4. Apart from the problems presented by the habeas corpus nature of this case are the substantive legal questions presented by the egregiously faulty charging document which commenced this criminal prosecution. This Court has inadvertently overlooked the potential harm that could be caused by the language used by the Fifth Circuit in deciding the cause.[2] This language, which establishes the law of the federal courts for those states within the competence of the Fifth Circuit, will be understood as establishing a rule of law that a state may misjoin defendants or offenses (even within the same count) without any allegation of connection between them, and that the prima facie error that may inhere in this misjoinder can be cured by reference to testimony outside the charging document itself. The burden of proof is shifted so that

[2] "It may be conceded, as the appellee so strenuously argues, that from the face of the information alone it would appear that distinct and separate offenses, committed in several counties, were charged against different persons, and that the information itself shows no connection between the several offenses nor between the various co-defendants. • • • The state's evidence upon the trial of the defendant and his co-defendants for the several substantive offenses clearly went to prove that there was but one vast lottery operation, covering several counties, operated, backed and banked by the appellee." 250 F. 2d at 647; original Petition, App. "A", p. 3-4.

the defendant must prove that he was actively prejudiced by the misjoinder and the state need do nothing. This burden, an extremely onerous one in practical terms, can virtually never be met and the net effect of these circumstances is to demolish, at least in the Fifth Circuit States so far as federal review is concerned, the rule that multiple defendants should not be misjoined.

This Court, it is respectfully urged, should reconsider its decision and correct the erroneous application of the law put forth by the Fifth Circuit. In so doing the Court will be following the philosophy of the *Kotteakos* case (*Kotteakos v. U.S.* 328 U.S. 750 (1946)), a philosophy with which the language of the Fifth Circuit in the instant matter is in conflict.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, it is respectfully urged that a rehearing be granted and that upon such rehearing a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CLAUDE PEPPER
WALTER A. APFELBAUM

PAT WHITAKER
TOM WHITAKER
MARK R. HAWES
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

_____

Counsel for Petitioner

PROOF OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing of Order Denying Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this _____ day of _____, 1958, to Richard W. Erwin, Attorney-General of the State of Florida, Attorney for Respondent, at his offices in Tallahassee, Florida.

_____

Claude Pepper